

**LAW OFFICE OF AMY JANE AGNEW, P.C.**

Honorable Loretta A. Preska  
Senior Justice, United States District Court  
Southern District of New York  
500 Pearl Street  
New York, New York 10007

July 20, 2022

**VIA ECF**

**Re: *Allen, et al. v. NYS DOCCS, et al.*, 19-cv-8173 (LP)(SN)**

Dear Judge Preska:

This office represents Plaintiffs in the above-captioned matter. I write to request an order from this Court modifying the HIPAA compliant protective to cover a limited amount of MWAP Request forms in a litigation pending in the Northern District of New York styled *Bushey v. Dinello, et al.*, 21-cv-076. The case is pending before the Hon. Gary Sharpe and Magistrate Judge Andrew Baxter. The *Bushey* litigation revolves around Defendant Dinello's refusal to treat a patient with testosterone replacement therapy. This claim butterflies with the instant litigation because Testosterone was on the MWAP medication list. The parties had an expedited injunction hearing in October of 2021. At the conclusion of the two-day hearing, Defendant Morley arranged to have Plaintiff examined by a *bona fide* endocrinologist at Albany Medical Center who endorsed the appropriateness of treatment. As hoped, our client was treated and immediately started experiencing improvement in his medical conditions.

Defendant Dinello testified at the injunction hearings that he had no policy against the treatment of hypogonadism with testosterone replacement therapy, nor against limiting the prescription of testosterone. He also testified that without ever examining Mr. Bushey or reviewing the numerous attorney letters he received with medical records showing effective treatment for over a decade, he made an individualized assessment that Mr. Bushey did not require treatment. Defendant Morley expounded (under oath) that at least 20 patients were being treated and, thus, there could be no policy. When cross-examined on whether those patients were, in fact, receiving testosterone for gender dysphoria or secondary hypogonadism, rather than Mr. Bushey's ailment, primary hypogonadism, Morley could not offer a pointed answer. After the injunction proceeding, in November of 2021 this Court issued a HIPAA Qualified Protective Order (Dkt. No. 317) pursuant to which Defendants in this case produced 10,000+ MWAP Request Forms, including those reviewed by Defendant Dinello for treatment of DOCCS' patients with testosterone.

Having seen the relevant MWAP Request forms, in post-hearing discovery, we requested the MWAP Request forms for patients "treated" or reviewed for testosterone treatment by Dinello. Defendants objected, suggesting the case was limited to an examination of the treatment Mr.

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Bushey received and that treatment of other patients was not relevant. The Court sustained the objection, and we explained the easiest course of production of the requested records was from the MWAP Request forms "directory" produced by Defendants in the instant litigation. Our office has all the relevant materials and we have already catalogued and sorted them.

While Magistrate Judge Baxter is willing to assist in any way possible, he did not want to modify the HIPAA Qualified Protective Order issued in this case. He requested that we approach this Court for a modification allowing our office to produce the responsive MWAP Request forms as produced by Defendants in this case to the Assistant Attorney Generals in *Bushey*. The responsive documents can be found at the following bates-numbers:

OAG MWAP 085758; OAG MWAP 085759; OAG MWAP 085809; OAG MWAP 085809; OAG MWAP 085810; OAG MWAP 085874; OAG MWAP 085875; OAG MWAP 085876; OAG MWAP 088237; OAG MWAP 086104; OAG MWAO 086105; OAG MWAP 086103; OAG MWAP 085121; OAG MWAP 085122; OAG MWAP 085126; OAG MWAP 085127; OAG MWAP 086977; OAG MWAP 089049; OAG MWAP 085273; OAG MWAP 086203; OAG MWAP 086220; OAG MWAP 086221; OAG MWAP 086223; OAG MWAP 086286; OAG MWAP 086302; OAG MWAP 086303; OAG MWAP 086395; OAG MWAP 086394; OAG MWAP 089092; OAG MWAP 086538; OAG MWAP 086770; OAG MWAP 086771; OAG MWAP 086772; OAG MWAP 086773; OAG MWAP 086774; OAG MWAP 086836; OAG MWAP 086882; OAG MWAP 086883; OAG MWAP 086936; OAG MWAP 086937; OAG MWAP 087083; OAG MWAP 086357; OAG MWAP 088889; OAG MWAP 088892; OAG MWAP 088891; OAG MWAP 089067; OAG MWAP 086436; OAG MWAP 088890; OAG MWAP 094200; OAG MWAP 089132; OAG MWAP 089260; OAG MWAP 087764; OAG MWAP 087762; OAG MWAP 087761; OAG MWAP 087763; OAG MWAP 087816; OAG MWAP 087817; OAG MWAP 087818; OAG MWAP 087819; OAG MWAP 094201; OAG MWAP 094200.

I am confident based on my experiences with DOCCS that compiling these materials (much less identifying them or their custodians) would be a futile effort and there is slim to no chance the AAGs in *Bushey* could locate them. We had to conduct an inordinate amount of work just to make the directory searchable and usable. (See Dkt. Nos. 367, 368.) Further, the documents are just going from one set of DOCCS' counsel to another by way of our office. We will work with Defendants' counsel in the *Bushey* case to assign each individual patient a pseudonym if they must be used at trial to protect the identity of the patients. I am confident that Messrs. David White and Matthew Gallagher, counsel for the State in *Bushey*, will treat the documents with respect and pursuant to this Court's order.

Accordingly, I respectfully request a very limited modification to this Court's HIPAA Qualified Protective Order of November 2, 2021 (Dkt. No. 317) allowing this office to produce the above-listed MWAP request forms to counsel for DOCCS' Defendants in *Bushey*. All other provisions of the HIPAA Qualified Protective order would continue to apply and I will request that the *Bushey* court so order a combination of the original order and the Court's modification

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SO ORDERED

LORETTA A. PRESKA  
UNITED STATES DISTRICT JUDGE

7/21/22

order. If the Court is inclined to grant my request but would prefer a clean order, I am happy to draft a proposed order for the Court's consideration.

Respectfully submitted,

/s/ AJ Agnew

Amy Jane Agnew, Esq.

cc: All Counsel of Record (via ECF)  
David White, Esq. (VIA EMAIL)  
Matthew Gallagher, Esq. (VIA EMAIL)  
Hon. Andrew Baxter (VIA ECF)